

Carpenters Local 209, United Brotherhood of Carpenters & Joiners of America, AFL-CIO and C. E. Wylie Construction Co. Case 31-CB-8256

September 26, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On June 21, 1991, Administrative Law Judge Gerald A. Wacknov issued the attached decision. Counsel for the Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Carpenters Local 209, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Palmdale, California, its officers, agents, and representatives shall take the action set forth in the Order.

¹The Respondent has excepted to the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Bernard Hopkins, Esq., for the General Counsel.
Gerald V. Selvo, Esq. (DeCarlo, Connor & Selvo), of Los Angeles, California, for the Respondent.
Mark T. Bennett, Esq. (Merrill, Schultz & Wolds, Limited), of San Diego, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter was held before me in Los Angeles, California, on February 12 and April 18, 1991. The charge was filed by C. E. Wylie Construction Co. (the Employer) on June 5, 1990. Thereafter, on July 10, 1990, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Carpenters Local 209, United Brotherhood of Carpenters & Joiners of America, AFL-CIO (the Respondent) of Section 8(b)(1)(A) of the National Labor Relations Act (the Act). The Respondent's answer, timely filed, denies that it has committed any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to intro-

duce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel, and counsel for the Respondent.

On the entire record, and based on my observation of the witnesses and consideration of the brief submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a California corporation with an office and place of business located in Palmdale, California, where it was engaged as the general contractor at the Highland High School jobsite. In the course and conduct of its business operations at the jobsite, the Employer received construction materials valued in excess of \$50,000 directly from a supplier located in the State of Oklahoma. I find that at all material times herein, the Employer has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Issues

The principal issues raised by the pleadings are whether the Respondent's business agent, on separate occasions on May 25 and June 5, 1990,¹ did engage in picket line misconduct by provoking and engaging in altercations with individuals as they attempted to drive through the gate of a construction project, and did remove and damage property, in violation of Section 8(b)(1)(A) of the Act.

B. The Facts

Perry Chamberlain was employed by Paxin Electric, a subcontractor of the Employer herein, at the Palmdale Highland High School construction project. On the morning of May 25, as Chamberlain was reporting to work at the jobsite, he observed that there were picketers walking in front of the 20-foot wide gate reserved for the Employer and nonunion contractors. The picketing had commenced several days before and, as Chamberlain had done since the picketing commenced, he slowed down his vehicle as he was approaching the gate and then proceeded to drive through the gate after Joseph Eickholt, the Respondent's business representative, had moved out of the way and had given Chamberlain enough room to drive through safely. Eickholt had a clipboard in his hand and waved the clipboard indicating that he wanted Chamberlain to stop the truck, apparently so that Eickholt could write down the license number of the vehicle. Chamberlain did not stop, but rather continued at a slow rate of speed, as there was no one in front of him.

Chamberlain testified that:

¹All dates or time periods hereinafter are within 1990 unless otherwise specified.

As I did that, I guess to get me to stop, the gentleman holding the clipboard stepped forward, as I had seen him do before, to try to intimidate people to stop. And by the time he stepped forward my [truck] was already beside him, not in front of him. And he stepped forward and hit my mirror on my truck.

Chamberlain went on to testify that Eickholt hit his left side rearview mirror with his chest, and pushed the mirror against the truck. This type of mirror is designed to fold back easily. When this occurred Chamberlain came “almost to a perfect stop,” and then proceeded on as Eickholt stepped back. Eickholt began screaming at Chamberlain, who observed through his inside rearview mirror that Eickholt had reached into the back of his truck and pulled out his leather work belt which was in the bed of the truck. As Eickholt grabbed the belt, the two pouches that were attached to the belt remained in the truck, and Eickholt retained the belt.

At this point Chamberlain stopped the truck, got out, and approached Eickholt, who continued yelling and screaming that, “You tried to run me over. I’m keeping this,” and spewing obscenities. According to Chamberlain, Eickholt said, “Who the fuck do you think you are? . . . You tried to fucking run me down, I’m taking this fucking belt. Fuck you.” Eickholt was shaking the belt in front of Chamberlain, and Chamberlain reached out and grabbed the belt and told Eickholt to give it back. Eickholt, who had his clipboard in one hand and the belt in the other, leaned back and with a “side kick” kicked Chamberlain in the stomach, and pulled the belt from Chamberlain’s hand. Chamberlain then reached out, grabbed the belt, and pulled it away from Eickholt.

At this point, Mark Evans, the project engineer for the Employer, told Chamberlain to get back in his truck and proceed through the gate. Chamberlain did so.

Eickholt testified that he was in charge of the picketing on May 25. There were five or six other pickets around at the time of the incident. Eickholt recalled that as he was standing at the side of the roadway, Chamberlain “drove up to me and pushed me aside with the front corner of his truck,” by turning the wheels of the truck toward him so that Eickholt had to step back from the front corner of the vehicle. Thus, according to Eickholt, he initially made contact with the front fender, and as he stepped back he also made contact with the driver’s side rearview mirror which, according to Eickholt, was not a “spring away side mirror” but rather a conventional side mirror that was not designed to spring back upon impact. Eickholt testified that, “I lost my balance, and trying to get my balance I ended up with a belt in my hand that came out of his truck.” Explaining, Eickholt stated that as he was pushing against the truck in an attempt to recover his balance, he reached over the top of the bed and ended up with Chamberlain’s belt in his hand.

Chamberlain stopped his truck and got out and an argument ensued. Eickholt accused Chamberlain of trying to hit him with the truck. Chamberlain yelled that Eickholt was stealing his belt. Eickholt said that he was not, and just let go of the belt. Chamberlain then got into his truck and drove off. When asked whether he hit or kicked Chamberlain, Eickholt replied, “We scuffled around a little bit there, ten seconds or so and then he left.” When again asked if he kicked Chamberlain in the stomach, Eickholt said, “I don’t believe I did.” Eickholt is 5 feet 9 inches and weighs about

155 pounds; Chamberlain is about 5 feet 11 inches and weighs about 190 pounds.

The second incident took place about 10 days later, on June 4. Paul Wylie, project superintendent for the Employer, was attempting to exit the same reserve gate at about 5:30 or 6 a.m., and stopped his truck because Eickholt was walking slowly across the roadway while writing something down on his clipboard. Wylie waited until Eickholt had moved to the side of the road, and proceeded “very slowly, very carefully” out the gate. Wylie testified that:

And at that point when I was—my passenger side was directly opposite of Mr. Eickholt’s—his body, he turned around and as [a] burro or donkey would kick, he kicked the side panel of my truck.²

. . . .

And he not only did it once, he did it twice. And that’s—I stopped, whatever he was trying to do, I stopped, got out of the truck and went around and asked him what he was doing, and tempers were very—it was a very tense situation.

. . . .

He did mention that I had hit him, that he was going—I was going to pay for it and some other things that I thought were out of context. But, that was the intent, that he thought that I had hit him with my truck and I did not.

. . . .

He started hitting me and calling me names, and started pummeling me with his fists. I at that point—At this juncture I was concerned he was going to hit me in the nose, and I knew how sensitive it was, there’s no way that was going to happen.³ So, I protected myself, I kept backing away, keeping away from him. He kicked me a couple of times, not in the groin, but he did kick me a couple of times.

According to Wylie, he kept protecting himself by putting his hands in front of his face, and kept backing away from Eickholt. The altercation ended when several individuals intervened and pulled them apart.

Mark Evans, project engineer, testified that he witnessed the incident which took place early in the morning when “it was just starting to be light.” Eickholt took several steps forward in order to get momentum to kick the truck. After Wylie came around to the side of the truck, apparently to observe the damage, Eickholt made the first move and tried to hit Wylie in the face, and “then proceeded after him, hitting, swinging. I rushed forward, some other people rushed forward, and we broke the fight up.” During the incident Wylie was backing up and covering his face with his arms. The entire incident lasted less than a minute.

²The kicks to the passenger side door panel caused damage in the amount of \$698.

³Wylie had been off work since May 31 when he had major nose reconstructive surgery, and June 4 was his first day back at work. Wylie testified that his nose was swollen and packed with gauze, and his face and eyes were swollen also.

Galen Hartgrove, an employee of the Employer who had just been hired that morning, corroborated Evans' testimony, and stated that Eickholt was 3 to 5 feet away from the side of the truck, "and it looked like three quick steps and he kicked in the side of the door."

Jim McDaniel, an employee of the Employer, testified that he observed that Eickholt was doing the swinging and was trying to kick Wylie, and Wylie "had his hands up in the air and was backing off like he was trying to protect himself."

Eickholt testified that he did not see Wylie exit the gate as he had his back turned to the gate. He became aware of a truck coming close to him, as close as 8 inches to a foot away, at a speed of 8 or 10 miles per hour. Eickholt spun around and kicked backwards with his right leg, contacting the truck. Then he pushed himself away from the vehicle. Wylie rolled down the window and asked, "What did you do?" Eickholt told him that he kicked his truck, and asked why Wylie was running at him with the truck. Wylie then got out of the truck and came around to the passenger side to look at the door, and approached Eickholt. Eickholt asked him why he was running his truck at him, and Wylie began yelling at Eickholt about kicking his truck. Eickholt told Wylie, "Hey, I'm just trying to protect myself." Then, according to Eickholt, Wylie "got in [his] face and we scuffled around there a little bit." Eickholt explained that, "He's up in my nose, you know, yelling at me. And then he gave me a push, and I pushed back, and we scuffled around there a little bit. And one of the pickets got in between us, and [Wylie] turned around and walked away, and that was the end of it." Eickholt did not observe that Wylie's face appeared to be bruised or discolored from his surgery, and was not aware that Wylie had recently had nose surgery.

Chris Davis was on picket duty during the June 4 incident. Davis testified that Eickholt was 2 or 3 feet off to the side of the road when Wylie drove his truck through the gate and "veered off the road towards Mr. Eickholt." Then, according to Davis, "there was some commotion of Mr. Eickholt trying to step away from the vehicle, and then the vehicle stopped." Davis did not see Eickholt kick the truck. Wylie then started coming around the front of the truck toward Eickholt and pushed him back. Then the two men were separated. Davis did not recall what words were exchanged during the altercation.

Troy Halsey was on picket duty during the June 4 incident. He was walking across the road as Wylie was exiting the gate. Halsey testified that Wylie directed the truck toward Eickholt. When Wylie got out of his truck he confronted Eickholt and Wylie kept pushing the incident as Eickholt was backing away. There was some pushing going on but Halsey does not know who pushed first. Then they began throwing punches. The fight was broken up once by another picketer, but then Wylie said something and the fight started again. Then the fight was broken up a second time and Wylie left. According to Halsey, the altercation lasted about 3 minutes.

C. Analysis and Conclusions

Both Chamberlain and Wylie appeared to be credible witnesses with vivid recollections of the incidents in which they were involved. The record evidence discloses no specific animosity between either of them and Eickholt in particular or the pickets in general, and it is unlikely that they would

make deliberate attempts to strike Eickholt with their vehicles with other pickets looking on. Further, Eickholt's accounts of the two incidents seem implausible. Thus, it is improbable that Eickholt would accidentally end up with Chamberlain's work belt in his hand unless he had made a deliberate effort to grab it, which he denies; and it is highly unlikely that Wylie, on his first day back on the job after constructive nose surgery, would have instigated the altercation or would have done anything other than protect his face from injury. Accordingly, I credit the accounts of the incidents as testified to by Chamberlain and Wylie. I do not credit the accounts given by Eickholt, Davis, or Halsey.

I find that Eickholt engaged in picket line misconduct by feigning that he had been struck by the vehicles, and by thereupon engaging in conduct which would reasonably provoke an altercation. I find that by striking, hitting, and kicking Chamberlain and Wylie, or by attempting to do so, and by removing Chamberlain's property from the back of his truck, and inflicting considerable damage to Wylie's truck, the Respondent, through Business Representative Eickholt, has engaged in conduct violative of Section 8(b)(1)(A) of the Act, as such conduct restrains and coerces employees in the exercise of their Section 7 rights to elect to engage in or refrain from engaging in union activity without fear of repercussions from a union. *Teamsters Local 703 (Kennicott Bros.)*, 284 NLRB 1125 (1987); *Nassau Insurance Co.*, 280 NLRB 878 (1986); *Congreso de Uniones Industriales de Puerto Rico (Rice Growers)*, 279 NLRB 626 (1986).

Respondent, in its brief, argues that the record evidence does not disclose that Chamberlain was an employee within the meaning of the Act, and that, as there were no employees who witnessed the May 25 incident, Eickholt's conduct toward Chamberlain could not be coercive to employees. The record evidence shows that Chamberlain was attempting to enter the jobsite with the tools of his trade. This is indicative of nonsupervisory status. Moreover, any report of the incident made known to other employees on the job would tend to coerce them to remain off the job in order to avoid injury to their person or damage to their vehicles. I find the Respondent's argument to be without merit.

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

THE REMEDY

Having found that the Respondent has engaged in conduct violative of Section 8(b)(1)(A) of the Act, it shall be required to cease and desist therefrom and from engaging in any similar unlawful acts or conduct. The Respondent shall also be required to post an appropriate notice, attached hereto as "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as

ORDER

The Respondent, Carpenters Local 209, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Feigning to be struck by vehicles as an excuse to provoke an altercation with supervisors or employees.

(b) Removing property from vehicles or damaging vehicles in furtherance of a labor dispute.

(c) Physically assaulting or attempting to physically assault employees or supervisors in furtherance of a labor dispute.

(d) In any like or related manner restraining and coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its offices and meeting halls copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Further, the Respondent shall sign sufficient copies of the notice and return them to the Regional Director for forwarding to the Employer, for

provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

posting at its premises or jobsites, should the Employer elect to do so.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT engage in misconduct on or around picket lines at jobsites by falsely accusing employees or supervisors of attempting to strike picketers with their vehicles and by provoking fights with them.

WE WILL NOT physically assault or attempt to physically assault employees or supervisors who may be crossing any picket line we have established.

WE WILL NOT remove property from vehicles or inflict damage to vehicles of employees or supervisors.

WE WILL NOT in any like or related manner restrain and coerce employees in the exercise of rights guaranteed them in Section 7 of the Act to engage in or refrain from engaging in any union activity.

CARPENTERS LOCAL 209, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO